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June 6, 1994

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JUN 6 1994

FEDERAL COMMUNICATIONS COMMISSION  
OFFICE OF SECRETARY

Mr. William F. Caton  
Secretary  
Federal Communications Commission  
Washington, D.C. 20554

Re: MM Docket No. 93-107  
Channel 280A  
Westerville, Ohio

Dear Mr. Caton:

Enclosed for filing on behalf of Ohio Radio Associates, Inc. are an original and eleven (11) copies of its "Motion to Dismiss the Application of ASF."

Please contact the undersigned in our Washington, D.C. office.

Respectfully submitted,

McNAIR & SANFORD, P.A.

By:

  
Stephen T. Yelverton

Enclosure

B:CATON.142

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JUN 6 1994

FEDERAL COMMUNICATIONS COMMISSION  
OFFICE OF SECRETARY

Before the  
FEDERAL COMMUNICATIONS COMMISSION  
Washington, D.C. 20554

**In re Applications of:**

**DAVID A. RINGER**

et al.,

**Applications for Construction  
Permit for a New FM Station,  
Channel 280A, Westerville,  
Ohio**

**MM Docket No. 93-107**

**File Nos. BPH-911230MA**

**through**

**BPH-911231MB**

**To: The Review Board**

**MOTION TO DISMISS THE APPLICATION OF ASF**

Respectfully submitted,

**MCNAIR & SANFORD, P.A.**

By: \_\_\_\_\_  
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Telephone: (202) 659-3900

**June 6, 1994**

**B: CATON. 142**

MOTION TO DISMISS THE APPLICATION OF ASF

Ohio Radio Associates, Inc. ("ORA"), by its attorneys, hereby submits this motion to dismiss the application of ASF Broadcasting Corporation ("ASF"). Dismissal is required because it does not have a proposed tower site and because it has failed to diligently prosecute its application by not obtaining a new site.

ORA requests leave to file this motion. Although the Commission has stayed or frozen the integration aspect of comparative hearings, the basic qualifying and non-integration aspects appear to remain unaffected. See, FCC Public Notice, FCC 94-41, released February 25, 1994. Because this motion raises certain basic qualifying and non-integration matters, it is appropriate. In support of its motion to dismiss, ORA offers the following comments.

In an amendment filed on April 15, 1994, ASF reported that its proposed tower site had been sold by Mid-Ohio Communications, Inc. to Spirit Communications, Inc. Although ASF never disclosed when the site was sold, it was given written confirmation of the sale by Mid-Ohio at least by March 2, 1994.

ASF further represented that it would be receiving "reasonable assurance" of the availability of the tower site from the new owner. However, in a pleading, dated May 13, 1994, ASF reported that the new owner had changed his mind. ASF was aware of the unavailability of the tower site from the new owner at least by April 13, 1994. ASF represented in its May 13, 1994, pleading that it was in the process of securing permission for a new site and promised to file an amendment. David A. Ringer, another applicant in this proceeding who also had initially specified the now unavailable Mid-Ohio tower site, filed amendment on May 9, 1994, specifying a new tower site. ASF so far has failed to file an amendment specifying a new tower site.

Accordingly, the application of ASF must be dismissed with prejudice for failure to prosecute. It does not have a tower site and has not been diligent in specifying a new site. ASF has known for over six weeks (since April 13, 1994) that its specified tower site is unavailable.

ASF has promised to file an amendment to specify a new site. It has been almost a month since Ringer, another applicant in this proceeding who is in the

same situation as ASF, filed an amendment specifying a new site. Inexplicably, ASF has not been heard from.

Commission policy requires that ASF act with "due diligence" in obtaining "reasonable assurance" for a new tower site. See, National Communications Industries, 6 FCC Rcd 1978, para. 4 (Rev. Bd. 1991); Marlin Broadcasting of Central Florida, Inc., 5 FCC Rcd 5751, 5753, n. 9 (1990); Brownfield Broadcasting Corp., 88 FCC2d 1054, 1058 (1982). See also, Section 73.3522(b); Erwin O'Connor Broadcasting Co., 22 FCC2d 142, 143 (Rev. Bd. 1970).

An applicant without a tower site is ineligible for grant and must be dismissed from the proceeding forthwith. See generally, Marc A. Albert, 6 FCC Rcd 13, 14-15, para. 6 (Rev. Bd. 1991), citing Local Morgan Hill Radio Association, 4 FCC Rcd 2404 (Rev. Bd. 1989), rev. denied, 5 FCC Rcd 498 (1990), summary dismissal is appropriate where a basic qualifying matter is not met; Chudy Broadcasting Corp., 58 RR2d 133 (1988), temporizing with flawed application proposals does not serve the public interest.

WHEREFORE, in view of the foregoing, ASF must be dismissed with prejudice because it does not have a proposed tower site and because it has failed to diligently prosecute its application by not obtaining a new site.

Respectfully submitted,

McNAIR & SANFORD, P.A.

By: 

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June 6, 1994

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CERTIFICATE OF SERVICE

I, Stephen T. Yelverton, an attorney in the law firm of McNair & Sanford, P.A., do hereby certify that on this 6th day of June, 1994, I have caused to be hand delivered or mailed, U.S. mail, postage prepaid, a copy of the foregoing "Motion to Dismiss the Application of ASF" to the following:

Joseph A. Marino, Chairman\*  
Review Board  
Federal Communications Commission  
Room 211  
2000 L Street, N.W.  
Washington, D.C. 20554

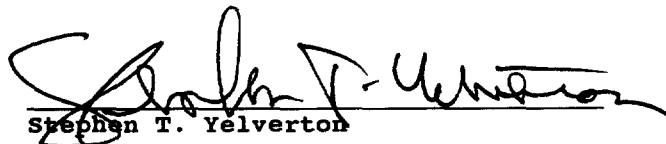
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\*Hand Delivery